

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT’S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION “SUMMARY ORDER”). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 16th day of February, two thousand twelve.

PRESENT:

DENNIS JACOBS,
Chief Judge,
RALPH K. WINTER,
REENA RAGGI,
Circuit Judges.

- - - - -X
Matthew D’Olimpio,
Plaintiff,

Michael Kaplan,
Plaintiff-Appellant,

-v.- 11-70-cv

Louis Crisafi, in his individual capacity; Brendan Vallely, in his individual capacity; Thomas D’Amicantonio, in his individual capacity; James Giglio, in his individual capacity; Michael Moffett, in his individual capacity; Paul Nadel, in his individual capacity; Jennifer Treacy, in her individual capacity; Kenneth Post, in his

1 individual capacity; Timothy Dewey, in
2 his individual capacity,
3 Defendants-Appellees.

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6 **FOR PLAINTIFF-APPELLANT:** James B. LeBow, LeBow and
7 Associates, PLLC, New York, NY.

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9 **FOR DEFENDANTS-APPELLEES:** Robert C. Weisz, Assistant
10 Solicitor General, New York, NY
11 (Eric T. Schneiderman, Attorney
12 General of the State of New
13 York; Barbara Underwood,
14 Solicitor General; and Michael
15 S. Belohlavek, Senior Counsel,
16 on the brief).
17

18 Appeal from a judgment of the United States District
19 Court for the Southern District of New York (Rakoff, J.).
20

21 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED,**
22 **AND DECREED** that the judgment of the District Court is
23 **AFFIRMED.**
24

25 Plaintiff-Appellant, Michael Kaplan, appeals the
26 District Court's decision dismissing his suit, which alleged
27 that he was retaliated against in violation of the First
28 Amendment for reporting supposed misconduct by his
29 supervising officer, Louis Crisafi. We assume the parties'
30 familiarity with the underlying facts, the procedural
31 history of the case, and the issues on appeal.

1 This Court reviews de novo a district court's dismissal
2 of a complaint under Rule 12(b)(6) of the Federal Rules of
3 Civil Procedure. Fowlkes v. Adamec, 432 F.3d 90, 95 (2d
4 Cir. 2005).

5 "In order to establish a First Amendment retaliation
6 claim, plaintiffs must prove that: (1) they engaged in
7 constitutionally protected speech because they spoke as
8 citizens on a matter of public concern; (2) they suffered an
9 adverse employment action; and (3) the speech was a
10 'motivating factor' in the adverse employment decision."
11 Skehan v. Vill. of Mamaroneck, 465 F.3d 96, 106 (2d Cir.
12 2006), overruled on other grounds as recognized in Appel v.
13 Spiridon, 531 F.3d 138, 139-40 (2d Cir. 2008) (per curiam).

14 The first element conforms to the Supreme Court's
15 instruction "that when public employees make statements
16 pursuant to their official duties, the employees are not
17 speaking as citizens for First Amendment purposes, and the
18 Constitution does not insulate their communications from
19 employer discipline." Garcetti v. Ceballos, 547 U.S. 410,
20 421 (2006). "The controlling factor" is whether the
21 plaintiff's "expressions were made pursuant to his
22 [employment] duties." Id. An expression is pursuant to
23 one's employment duty (and thus unprotected by the First
24 Amendment), if it is "in furtherance of one of his core

1 duties," Weintraub v. Bd. of Educ., 593 F.3d 196, 198 (2d
2 Cir. 2010), "part-and-parcel of his concerns about his
3 ability to properly execute his duties," id. at 203, or
4 "'speech that owes its existence to a public employee's
5 professional responsibilities," id. at 201 (quoting
6 Garcetti, 547 U.S. at 421).

7 Kaplan's appeal "has focused on his complaints to the
8 Inspector General and the retaliation that ensued
9 thereafter," Kaplan Reply Br. at 7, but Kaplan's reporting
10 to the Inspector General was part of his employment duties.
11 Under Section 55(1) of New York Executive Law, a state
12 employee such as Kaplan

13 shall report promptly to the state inspector general
14 any information concerning corruption, fraud, criminal
15 activity, conflicts of interest or abuse by another
16 state officer or employee relating to his or her office
17 or employment The knowing failure of any
18 officer or employee to so report shall be cause for
19 removal from office or employment or other appropriate
20 penalty.

21 Kaplan's complaints regarding Crisafi are in those
22 categories. For example, Kaplan reported that Crisafi was
23 purposely violating suspects' constitutional rights, a
24 federal crime (see 18 U.S.C. § 242); Kaplan claimed that

1 Crisafi obtained his state job by misrepresenting his
2 credentials (i.e., fraud); and Kaplan reported that Crisafi
3 had improperly placed police lights and a siren on his
4 personal vehicle and was working other jobs during business
5 hours (i.e., corruption and abuse of office).

6 Finally, Kaplan reported that Crisafi was ordering or
7 taking part in ill-conceived arrests, searches, and
8 undercover operations and abusing prescription narcotics.

9 Speech that is "part-and-parcel of [an employee's] concerns
10 about his ability to properly execute his duties" is the
11 speech of a public employee pursuant to his duties and not
12 of a private citizen. Weintraub, 593 F.3d at 203 (internal
13 quotation marks omitted). As Kaplan concedes, a number of
14 Crisafi's alleged actions "affect[ed] [Kaplan's] performance
15 of his own duties." Kaplan Opening Br. at 31. Crisafi was
16 Kaplan's immediate supervisor, and Crisafi's alleged
17 behavior raised reasonable concerns by Kaplan of his ability
18 to execute his own duties.

19 Because Kaplan's report to the Inspector General was
20 made pursuant to and in furtherance of his employment
21 duties, see Weintraub, 593 F.3d at 198, 201, 203, Kaplan was
22 acting as a public employee and not a private citizen.¹

¹ Kaplan's reliance on our decision in Jackler v. Byrne, 658 F.3d 225 (2d Cir. 2011), is misplaced. In that

1 Accordingly, any retaliation against his speech did not
2 violate his First Amendment rights.

3
4 We have considered all of Kaplan's additional arguments
5 and find them to be without merit. Accordingly, the
6 judgment of the District Court is AFFIRMED.

7
8 FOR THE COURT:
9 Catherine O'Hagan Wolfe, Clerk

case, we concluded that an officer who refused an order to retract a truthful statement and replace it with a false one acted as a private citizen, rather than as a public employee. See id. at 241-42. Jackler's reasoning does not extend to this quite different factual context, where the employee engaged in speech mandated by law as a duty of his job.